Dakota Premium Foods *and* United Food and Commercial Workers Local 789, Petitioner. Case 18–RC–16679

August 27, 2001

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held July 21, 2000, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of the ballots shows 112 votes for and 71 against the Petitioner, with 7 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings[1] and recommendations[2], and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Food and Commercial Workers, Local 789, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, including line leads, employed by the Employer at its 425 South Concord Street, South St. Paul, Minnesota facility, and shipping employees employed at the Employer's Newport facility, excluding office clerical employees, professional and managerial employees, and guards and supervisors as defined in the Act.

Dated, Washington, D.C. August 27, 2001

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting.

As I explained in my dissent in *Systrand Manufacturing Corp.*, 328 NLRB No. 111 (1999), I would require a clear written disclaimer on the face of any altered sample ballot, or in the alternative, an oral disclosure by the defacing party that it is responsible for the altered sample ballot. Because the altered sample ballot at issue in this case was accompanied by no such disclaimer, I find merit in the Employer's objection. Thus, I would set aside the election.

The Employer's objection contends that the Petitioner interfered with the election by distributing to employees copies of the official sample ballot, defaced with the "Yes" box checked. These sample ballots did not identify the source of the defacement. The only other language printed on these sample ballots (in English and Spanish) was the following: "[t]he company cannot take away or change your benefits during an organizing campaign or contract negotiations. That means the company cannot lower your wages, take away your bonuses or attempt to change your insurance." The Employer argues that these altered sample ballots gave employees the misleading impression that the Board supported the Union.

The evidence establishes that, 5 days prior to the election, the Petitioner created the sample ballots to be passed out at a Petitioner-sponsored prayer service. In the days that followed, the altered ballots were distributed to employees, by anonymous placement in high traffic areas within the plant, including near the employees' timeclock and in the break room.

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] Consistent with his dissent in *Systrand Manufacturing Corp.*, 328 NLRB No. 111 (1999), our dissenting colleague seeks to establish a new "bright line" test in which he would require that an altered sample ballot circulated as election campaign propaganda must contain either a written or oral disclaimer. As in *Systrand*, we decline to modify well-developed Board precedent with respect to the use of altered or defaced sample ballots as election propaganda. We find that the hearing officer appropriately applied the Board's two-part analysis set out in *SDC Investments*, 274 NLRB 557 (1985), in determining that the Union's distribution of marked sample ballots was not objectionable because employees receiving these documents could easily conclude that they came from the Petitioner. In addition, contrary to our dissenting colleague, we agree with the hearing officer that the language on the Board's revised Notices would have effectively disclaimed any participation by the Board in the preparation of the sample ballot, and would have sufficiently reassured employees of the Board's neutrality in the election. We further find no objective record basis for the dissent's general observation about the Employer's Spanish-speaking employees' ability to understand the Board's election process.

These altered ballots did not contain a written acknowledgment of their origin. Nor was it obvious that the Union was the author of the document. In this latter regard, I recognize that the Union was the party that distributed the sample ballots at the prayer service. However, this does not necessarily mean that employees would understand that the Union was the author of the ballot. It is not unusual for a private person or organization to pass out governmental documents. The impression of Board authorship is heightened by the message on the sample ballot which purports to set forth Board law. Further, when these ballots were later found near the timeclock and in the break room, the source of the altered ballots would not have been apparent, and employees would not know that the ballots were union documents. Under these circumstances, and in agreement with the Employer, I am concerned about the danger that employees would be misled into believing that the Board supported the Petitioner.[3]

Concededly, the official Board election notice (in English only) posted in the Employer's facility affirmatively disclaimed Board involvement in any altering of sample ballots.[4] However, that disclaimer was not apparent on the face of the altered ballots. Employees are far more likely to see the "yes" mark on a ballot handed to them than they are to read the fine print on a notice placed on a wall. In any case, as I said in my dissenting opinion in *Systrand*, to protect the Board's vital interest in preserving its actual and perceived neutrality, and to establish a "bright line" test, I would require a clear disclaimer on the face of any defaced sample ballot or a disclosure by the defacing party that it is responsible for the altered sample ballot.

Accordingly, I would sustain the Employer's objection, set aside the election and order that a new election be held.

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

MARKINGS THAT YOU MAY SEE ON ANY SAMPLE BALLOT OR ANYWHERE ON THIS NOTICE HAVE BEEN MADE BY SOMEONE OTHER THAN THE NATIONAL LABOR RELATIONS BOARD AND HAVE NOT BEEN PUT THERE BY THE NATIONAL LABOR RELATIONS BOARD. THE NATIONAL LABOR REALATIONS BOARD IS AN AGENCY OF THE UNITED STATES GOVERNMENT, AND DOES NOT ENDORSE ANY CHOICE IN THE ELECTION.

[3] This concern is especially true for the Employer's Spanish-speaking employees who may not be familiar with our language or political system, and can therefore be less than clear about the Board's role in the election.

[4] The language on the Notice of Election reads as follows: WARNING: THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND MUST NOT BE DEFACED BY ANYONE. ANY